Petition

Office - Supreme Court, U.S.
FILED
NOV 9 1981
ALEXANDER L. STEVAS
CLERK

81-1220

October, 1981 Term

No.

In the Supreme Court of the United States

JOLUND WALTER SCHMEDT,

Petitioner,

vs.

FERNANDO E. C de BACA,
WALTER ROYBAL,
CHARLES LOPEZ,
DONALD A. PERKINS,
JOHN BECK,
TED A. MARTINEZ,
KENNIS RAY BERARD,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOLUND W. SCHMEDT
Petitioner pro se
1331 Park Ave., S.W.
Unit #1110
Albuquerque, New Mexico 87102
(505) 242-2481

QUESTIONS PRESENTED

There are four questions. First, does 42 USC 1983 phrase **"and laws"** encompass claims based in part on statutory violations of federal laws? Second, can an employee in a state program controlled by federal law and also fired after refusing to break that law, claim deprivation of rights under 42 USC 1983? Third, when an employee in above situation is fired for interfering with the efficient operation of the agency which is controlled by federal law and regulations, should the "interference with the efficient operation of the agency" be measured by federal law and regulations? Fourth, if there has been a determination by the trial court that an employee was required to violate federal laws and regulations and was fired after refusing to do so, should the jury be so instructed?

A question arising from the first three above is: was the decision at trail to extract statutory issues and the affirmation of such decision by the United States Court of Appeals for the Tenth Circuit in conflict with applicable decisions of the Supreme Court of the United States?

INDEX TO PETITION

Page

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1-6

STATEMENT OF CASE 6-7

REASONS FOR GRANTING WRIT 7-8

CONCLUSION 8

INDEX TO APPENDIX

Page

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, OF AUGUST 11, 1981 1-4

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, OF AUGUST 11, 1981 5

JOURNAL ENTRY OF JUDGMENT OF JULY 3, 1980 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO 6-7

AFFIDAVIT 8

TABLE OF CASES

Page

BOXALL V. SEQUOIA UNION HIGH SCHOOL DIST. 464 F Supp 1104 7

LAKE COUNTRY ESTATES, INC. V. TAHOE REGIONAL PLANNING AGENCY (1979) 440 US 391, 59 L. Ed2d 401, 99 S. Ct. 1171 on remand (DC Nev) 474 F Supp 901 7

LA RAZA UNIDA V. VOLPE (1977) 440 F Supp 904 .. 7

MAIN V. THIBOUTOT (1980 US) 65 L.Ed. 2d 555, 100 S. Ct. 2502 7

October, 1981 Term

No.

In the Supreme Court of the United States

JOLUND WALTER SCHMEDT,

Petitioner,

vs.

FERNANDO E. C de BACA,
WALTER ROYBAL,
CHARLES LOPEZ,
DONALD A. PERKINS,
JOHN BECK,
TED A. MARTINEZ,
KENNIS RAY BERARD,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:
Jolund Walter Schmedt, pro se, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on August 11, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not for routine publication and is printed in Appendix A hereto, infra, pages 1 through 4. The judgment of the United States Court of Appeals for the Tenth Circuit is printed in Appendix A hereto, infra, page 5. The Journal Entry of Judgment of the United States District Court for the District of New Mexico is printed in Appendix A hereto, infra, pages 6 and 7.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (Appendix A, infra, page 5) was entered on August 11, 1981. The jurisdiction of the Supreme Court is invoked pursuant to 28 USC 1254(1).

QUESTIONS PRESENTED

There are four questions. First, does 42 USC 1983 phrase "**and laws**" encompass claims based in part on statutory violations of federal laws? Second, can an employee in a state program controlled by federal law and also fired after refusing to break that law, claim deprivation of rights under 42 USC 1983? Third, when an employee in above situation is fired for interfering with the efficient operation of the agency which is controlled by federal law and regulations, should the "interference with the efficient operation of the agency" be measured by federal law and regulations? Fourth, if there has been a determination by the trial court that an employee was required to violate federal laws and regulations and was fired after refusing to do so, should the jury be so instructed?

A question arising from the first three above is: was the decision at trail to extract statutory issues and the affirmation of such decision by the United States Court of Appeals for the Tenth Circuit in conflict with applicable decisions of the Supreme Court of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved the first section of the Fourteenth Amendment to the Constitution of the United States which

provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involved the First Amendment to the Constitution of the United States which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

This case also involved 42 USC 1983 which, at the time the action was begun provided as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. United States Code Service - Lawyers Edition: Title 42 USCS 1861 - 1983; p. 319

This case also involved the following statutes which were extracted by the trial court and which extraction was further affirmed by the United States Court of Appeals for the Tenth Circuit:

(1) 42 USC 602 (a) (19) (G) which provides as follows:

> that the State agency will have in effect a special program which (i) will be administered by a sepa-

rate administrative unit and the employees of which will, to the maximum extent feasible, perform services only in connection with the administration of such program, (ii) will provide (through arrangements with others or otherwise) for individuals who have been registered pursuant to subparagraph (a), in accordance with the order of priority listed in section 433(a) (43 USCS 633(a)), such health vocational rehabilitation, counseling, child care, and other social and supportive services as are necessary to enable such individuals to accept employment or receive manpower training provided under part C (42 USCS 663-644), and will, when arrangements have been made to provide necessary supportive services, including child care, certify to the secretary of Labor those individuals who are ready for employment or training under part C (42 USCS 630-644), (iii) will participate in the development of operational and employability plans under section 433(b) (42 USCS 663(b)); and (iv) provides for purposes of clause (ii), that, when more than one kind of child care is available, the mother may choose the type, but she may not refuse to accept child care services if they are available. United States Code Service - Lawyers Edition: Title 42 USCS 601 - 1339; pp. 26, 27.

(2) 42 USC 602 (a) (19) (F) which provides as follows:

that if and for so long as any child, relative, or individual (certified to the Secretary of Labor pursuant to subparagraph (G) has been found by the Secretary of Labor under section 433 (g) (42 USCS 633(g)) to have refused without good cause to participate under a work incentive program established by part C (42 USCS 630-644), or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an em-

ployer if the offer of such employer is determined, after notification by him, to be a bonafide offer of employment. United States Code Service - Lawyers Edition: Title 42 USCS 601-1339; p. 25

(3) 42 USC 633 (g) which provides as follows:

Refusal to accept employment or participate in project. Where an individual, certified to the Secretary of Labor pursuant to section 402(a) (19) (G) (42 USCS 602(a) (19) (G)) refuses without good cause to accept employment or participate in a project under a program established by this part (42 USCS 630-644), the Secretary of Labor shall (after providing opportunity for fair hearing) notify the State agency which certified such individual and submit such other information as he may have with respect to such refusal. United States Code Service - Lawyers Edition: Title 42 USCS 601 - 1339; p. 103

(4) 42 USC 665 (b) which provides as follows:

Whoever, by threat of procuring dismissal of any person from employment or of refusal to employ or refusal to renew a contract or employment in connection with a grant or contract of assistance under the Comprehensive Employment Training Act of 1973, induces any person to give up any money or thing of any value to any person (including such grantee agency) shall be fined not more than $1,000 or imprisoned not more than one year, or both. United States Code Service - Lawyers Edition: Title 18 USCS 431 - 1070; p. 346

(5) 29 USCS 206 (a) (5) (b) which provides as follows:

Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such work-

week is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966 (29 USCS 203, 206, 207, 213, 214, 216, 255), title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rates:

(1) not less than $1.90 an hour during the period ending December 31, 1974,

(2) not less than $2 an hour during the year beginning January 1, 1975,

(3) not less than $2.20 an hour during the year beginning January 1, 1976, and

(4) not less than $2.30 an hour after December 31, 1976. United States Code Service - Lawyers Edition: Title 29 USCS 206 - 400; p. 3.

(6) 42 USCS 2000e-2(b) which provides as follows:

Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin. United States Code Service - Lawyers Edition: Title 42 USCS 1984 - 2000e-5; p. 151.

(7) 42 USCS 2000e-2(d) which provides as follows:

Training programs. It shall be unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training. United States Code Service - Lawyers Edition: Title 42 USCS 1984 - 2000e-5; p. 152.

(8) 5 USCS 552 (a) (1) (E) which provides as follows:

Each amendment, revision, or repeal of the foregoing. Except to the extent that a person has

actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. United States Code Service - Lawyers Edition: Title 5 USCS 1 - 900; p. 52.

(9) 5 USCS 552 (a) (2) which provides as follows:

Each agency, in accordance with published rules, shall make available for public inspection and copying –

(a) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(c) administrative staff manuals and instructions to staff that affect a member of the public.

United States Code Service - Lawyers Edition: Title 5 USCS 1 - 900; p. 52.

STATEMENT OF CASE

This is a complaint: deprivation of civil rights under color of law - social worker II fired in violation of first and fourteenth amendment rights for refusing to break federal and state law and agency policies. The basis for federal jurisdiction in court of first instance was 28 USCS 1331; 42 USCS 1983, following Federal Rules of Civil Procedure 8(a), 57.

Petitioner, pro se did not object to issues as framed at pretrial conference (leaving out the claims based on refusing to break federal and state law and the agency policies) because of belief that claims would be heard anyway once appellees introduced their claims that petitioner was fired for interfering with the efficient operation of the agency which is defined by federal and state law and agency policies.

After the appellees introduced their claims, petitioner, pro se was not able to pursue the claims of refusing to break federal

and state law and the agency policies and the jury was naturally not instructed.

REASONS FOR GRANTING WRIT

The court of appeals has decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States.

> The Civil Rights Act of 1871 (42 USCS 1983) must be given a liberal construction. *Lake Country Estates, Inc. v Tahoe Regional Planning Agency* (1979) 440 US 391, 59 L. Ed 2d 401, 99 S Ct 1171, on remand (DC Nev) 474 F Supp 901.
>
> Phrase "and laws" in 42 USCS 1983 need not be interpreted by reference to legislative history, since meaning of words is plain and supported by consistent judicial interpretation to encompass claims based on purely statutory violations of federal law, without limitation to federal laws dealing with civil rights or equal protection. *Main v Thiboutot* (1980 US) 65 L Ed 2d 555, 100 S Ct 2502.

The court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

> 42 USCS 1983 is available to redress deprivations under color of state law of rights, privileges, and immunity secured by federal statutes as well as by the Constitution. *La Raza Unida v Volpe* (1977) 440 F Supp 904.
>
> Under 42 USCS 1983 plaintiff can generally sue to enforce federal statutory rights as well as constitutional rights. *Boxall v Sequoia Union High School Dist.* 464 F Supp 1104.

It is true that petitioner refused to follow instructions from his supervisors who required him to join them in breaking federal and state laws in order to keep his job. It is true that permission to leave the office was not granted as petitioner was to remain in office to participate in interviews held without the legally effective consent of the clients and in violation of applicable federal and state statutes. It is not true that petitioner signed out for non-work related activities which would have been shown had the statutory claims been heard.

In a country founded upon law and respect for law, it is sad and frightening for an appeals court to hold, "It was irrelevant to the lawsuit whether the orders of the appellant's (petitioner's) superiors were lawful." (Appendix A hereto, infra, page 4.)

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,
JOLUND W. SCHMEDT

By Jolund W. Schmedt

Jolund W. Schmedt
Petitioner pro se
1331 Park Ave. S.W.
Unit #1110
Albuquerque, New Mexico 87102
Telephone: (505) 242-2481

November 5th, 1981

Appendix

APPENDIX A
OPINIONS BELOW

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOLUND WALTER SCHMEDT,

Plaintiff-Appellant,

v.

FERNANDO E. C de BACA, WALTER ROYBAL, CHARLES LOPEZ, DONALD A PERKINS, JOHN BECK, TED A. MARTINEZ, and KENNIS RAY BERARD,

Defendants-Appellees.

No. 80-1812

Appeal from the United States District Court
For the District of New Mexico
(D.C. No. CIV 78-959HB)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Jolund Walter Schmedt, pro se.

Louise Gibson of Shaffer, Butt, Thornton & Baehr, P.C., Albuquerque, New Mexico, for Defendants-Appellees.

Before SETH, Chief Judge, PICKETT and SEYMOUR, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance the determination of this appeal. *See* Fed. R. App. P. 34(a), Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from a judgment, after trial to a jury, dismissing appellant's action filed pursuant to 42 U.S.C.§ 1983.

Appellant has filed a motion for leave to proceed in forma pauperis, and appellees have filed a motion to affirm.

We first consider appellant's motion for leave to proceed in forma pauperis. Appellant was granted leave to proceed in forma pauperis in the district court. Although the district court did not elaborate its reasons, appellant's financial affidavit and application to proceed in forma pauperis show that at the time he commenced the action he had been unemployed for more than a year and had no other source of income.

On appeal the district Court denied appellant leave to proceed in forma pauperis, again without elaborating the reasons therefore. The record shows, however, that appellant was employed and had a net income of five-hundred nine dollars and sixteen cents ($509.16) per month at the time he filed this appeal.

The standards for filing an appeal in forma pauperis are set forth in Fed. R. App. P. 24(a) and in pertinent part provide:

> . . . a party who has been permitted to proceed in an action in the district court in forma pauperis . . . may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of

> appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

The district court denied appellant's application for leave to proceed in forma pauperis without a statement of reasons for the denial. In such circumstances, some courts choose to hold the case in abeyance and remand to the distist court for compliance with the rule. *See* Davis v. Clark, 404 F. 2d 1356 (D.C. 1968); Christian v. United States, 404 F. 2d 328 (8th Cir. 1968). While we approve of this procedure, it would seem inappropriate and less than expeditious in a situation where, as here, we desire to grant appellees' motion to affirm. Furthermore, the record does not show that the appeal is not taken in good faith (as distinguished from without merit, *see* Coppedge v. United States, 309 U.S. 438 (1962)) and appellant's in forma pauperis affidavit shows that his necessary expenses are virtually equivalent to his net income. We therefore grant appellant's motion for leave to proceed in forma pauperis.

We next consider appellees' motion to affirm. Appellees contend that the trial court properly delineated the issues for trial, and that the judgment of the district court was supported by substantial evidence.

Appellant was discharged from his position as social worker with the New Mexico Department of Social Services. He contends he was discharged for exercising his first amendment right to criticize the state agency that employed him. On appeal appellant raises two related issues. He claims that the trial court would not allow him to pursue the lawfulness of certain directives issued by his superiors and would not allow him to pursue the issue of whether he could lawfully be discharged for refusing to obey those orders which he perceived to be illegal.

In order to make out a § 1983 civil rights action, the conduct complained of must be engaged under color of state law and amount to a violation of civil rights guaranteed by the laws or Constitution of the United States. *See* Smart v. Villar, 547 F. 2d 112 (10th Cir. 1976). Thus the trial court at the pretrial conference properly extracted the following issues from

appellant's pro se complaint -- whether he was denied due process and whether he was discharged for criticizing the state agency. Appellant made no objection to the issues being framed in this manner. The only cognizable issue under § 1983 was again restated by the district judge at trial as whether appellant was discharged for exercising a first amendment right to make a protest or complaint against the state agency that employed him. It was irrelevant to the lawsuit whether the orders of appellant's superiors were lawful so long as he was not discharged for voicing his opinion against them. We conclude that the trial court properly delineated the trial issues and properly excluded evidence concerning the lawfulness of the directives.

Appellees' motion to affirm also asserts that the evidence supported the jury's conclusion that appellant was discharged for a lawful reason. We agree, from the partial transcript of the jury trial which we have before us on appeal, that the evidence is more than sufficient for the jury to have concluded that appellant was discharged for refusing to follow instructions from his supervisors, leaving the office without permission, and signing out for non-work related activities. We know of no constitutional prohibition against discharge of an employee for these reasons.

Appellees' motion to affirm is granted and the judgment of the district court is affirmed. The mandate shall issue forthwith.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JULY TERM - August 11, 1981

Before Honorable Oliver Seth, Honorable John C. Pickett, and Honorable Stephanie K. Seymour, Circuit Judges.

JOLUND WALTER SCHMEDT,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	JUDGMENT
	)	
FERNANDO E. C. DE BACA, WALTER ROYBAL, CHARLES LOPEZ, DONALD A. PERKINS, JOHN BECK, TED. A. MARTINEZ, and KENNIS RAY BERARD,	)	No. 80-1812
	)	(D.C. No. 78-959-HB)
	)	
	)	
Defendants-Appellees	)	

Upon consideration of the record on appeal and the motion of appellee(s) to affirm pursuant to Rule 9 of the Rules of this Court, it is ordered that the motion is granted and the judgment of the United States District Court for the District of New Mexico is affirmed.

s/HOWARD K. PHILLIPS,
Clerk

J-6 5/75

App. 6

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF NEW MEXICO

Civil Action File No. 78-959 HB

JOLUND WALTER SCHMEDT,

vs.

CHARLES LOPEZ, et al.

This action came on for trial before the Court and a jury, Honorable Howard Bratton, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff taking nothing, that the action be dismissed, and that each party bear its own costs of action.

Dated at Albuquerque, New Mexico, this 3d day of July, 1980.

JESSE CASAUS
Clerk of Court

by s/ Kathryn Rael Garcia
Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOLUND WALTER SCHMEDT,

Plaintiff,

vs. No. CIV-78-959-HB

FERNANDO E. C DE BACA, et al.,

Defendants.

JUDGMENT

THIS MATTER having come on for trial before the Court and Jury, the Plaintiff having proceeded pro se and the Defendants having been represented by their attorney, and the issues having been duly tried and the Jury having duly rendered its verdict,

THE COURT FINDS THAT this action has been properly tried, and the Court has jurisdiction over the parties and the subject matter of this suit.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that a Directed Verdict be entered in favor of Defendants Fernando E. C De Baca, John Beck, and Kennis R. Berard.

IT IS ALSO ORDERED that the Plaintiff take nothing, that the action be dismissed on the merits, and that each party bear its own costs of the action.

s/ HOWARD BRATTON
UNITED STATES DISTRICT
COURT JUDGE

AFFIDAVIT

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

I, Jolund Walter Schmedt, being first duly sworn, depose and say that I am the petitioner pro se in the above entitled action, and that, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on each of the parties to be served herein, as follows:

On Fernando E. C de Baca, Walter Roybal, Charles Lopez, Donald A. Perkins, John Beck, Ted A. Martinez and Kennis Ray Berard the defendants-appellees herein, by delivering same to Louise Gibson in the offices of Shaffer, Butt, Thornton & Harhr PC counsel of record for said C de Baca, Roybal, Lopez, Perkins, Beck, Martinez and Berard, located at the 10th floor of the Sandia Savings Blvd., 400 Gold Ave. S.W., Albuquerque, New Mexico, on December 9th, 1981.

All parties required to be served have been served.

Jolund W. Schmedt
Jolund Walter Schmedt

SUBSCRIBED AND SWORN TO before me this 9th day of December, 1981.

Marcella Garcia
Notary Public

OFFICIAL SEAL
MARCELLA GARCIA
NOTARY PUBLIC - NEW MEXICO
Notary Bond Filed with Secretary of State
My Commission Expires: [redacted]

My Commission Expires July 24, 1982

Opposition

Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

CASE NO. 81-1220

IN THE
SUPREME COURT
OF THE
UNITED STATES

October 1981 Term

JOLUND WALTER SCHMEDT,

Petitioner,

vs.

FERNANDO E. C de BACA, WALTER ROYBAL, CHARLES LOPEZ, DONALD A. PERKINS, JOHN BECK, TED A. MARTINEZ, DENNIS RAY BERARD,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Brief in Opposition to Petition for Writ of Certiorari

Paul L. Butt
Counsel for Respondent
Shaffer, Butt, Thornton & Baehr, P. C.
Post Office Box 527
Albuquerque, N.M. 87103
[505] 343-7425

Jolund W. Schmedt
Pro Se
Unit 1110
1331 Park Ave., S.W.
Albuquerque, N.M. 87102
[505] 242-2481

TABLE OF CONTENTS

	Page No.
QUESTIONS PRESENTED	iii
OPINIONS BELOW	iv
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:	Page No.
American Home Assurance Co. v. Cessna Aircraft Co., 551 F.2d 804 (10th Cir. 1977)	9
Hodges v. United States, 597 F.2d 1014 (5th Cir. 1979)	11, 12
Trujillo v. Uniroyal Corp., 608 F.2d 815 (10th Cir. 1979).	9, 10

QUESTIONS PRESENTED

The sole question in this case is whether the Court of Appeals properly affirmed the Trial Court's limitation of the issues for trial to: (a) whether the petitioner was denied due process; and (b) whether he was discharged for criticizing the State agency.

OPINIONS BELOW

In addition to the opinions cited by Petitioner, Respondents add the District Court's Pre-Trial Memorandum Opinion, filed on October 29, 1979, printed in Appendix "A".

JURISDICTIONAL STATEMENT

As provided in Rule 17.1, Rules of the United States Supreme Court, a review on Writ of Certiorari is not a matter of right, but is a matter of judicial discretion. A review will be granted only when there are special and important reasons therefor. The present matter unquestionably fails to meet this criteria.

Petitioner claims that the Tenth Circuit Court of Appeals has rendered a decision in conflict with applicable Supreme Court decisions and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Neither allegation is supportable. Petitioner has not and cannot display any special and important reasons sufficient to gain review by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involved the Fourteenth and the First Amendments to the United States Constitution which are hereinafter set forth:

FOURTEENTH AMENDMENT:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FIRST AMENDMENT:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

Also involved was 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, sub-

jects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this Section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner's pro se complaint alleged constitutional violations arising from Petitioner's discharge from his state agency employer, and specifically, that the termination was based upon Petitioner's protests concerning the policies and practices of his employer. The Trial Court limited the issues in a Pre-Trial Memorandum Order (Appendix "A") as follows: "The only valid issue under 42 U.S.C. §1983 as regards Plaintiff's termination is whether or not the Plaintiff was discharged from employment in violation of his First and Fourteenth Amendment rights." The Trial Court stated that "[a]djudication of this claim does not require any determination of whether the State agency was acting in accordance with law." After a three-day trial, the jury returned a verdict in favor of the Defendants. The Tenth Circuit Court of Appeals affirmed the decision, ruling that the

Trial Court properly extracted the issues (which were whether the Petitioner was denied due process and whether he was discharged for criticizing the State Agency) and that the evidence was more than sufficient to support the jury verdict that the Petitioner was discharged for lawful reasons.

SUMMARY OF ARGUMENT

In the two federal forums already addressed, Petitioner has detailed his desire to explore the policies and practices of his former State agency employer within the context of his §1983 lawsuit. Both Federal Courts clearly ruled that the only valid Section 1983 issue in regard to Petitioner's termination was whether he was discharged from employment in violation of his First and Fourteenth Amendment rights. The Courts were united in the view that adjudication of Petitioner's claim did not require any determination of whether the State agency was acting in accordance with law. Such rulings are proper, are not in conflict with applicable Supreme Court decisions, and do not represent deviations from acceptable judicial proceedings.

ARGUMENT

After unsuccessfully arguing his position in both the Trial Court and the Court of Appeals, Petitioner reiterates once again that he was denied a full hearing on his allegations of constitutional violations. His Petition for Writ of Certiorari urges for the third time that he should be allowed, within the context of his §1983 lawsuit, to pursue allegations concerning the policies and practices of his former State agency employer.

The Pre-Trial Order submitted by both parties and signed by the Court was filed on August 20, 1979. The Order was formulated after a Court-conducted Pre-Trial Conference attended by both parties. Reasonable opportunity was afforded both sides for corrections and additions. The Order clearly stated that it would control the course of the trial and that the pleadings were deemed

merged therein.

The Pre-Trial Order contained the following description of Petitioner's claims:

> The Plaintiff claims he is suffering irreparable harm and deprivation of civil rights under color of law by being fired in violation of his First and Fourteenth Amendment right for refusing to break Federal and State law and agency policy which defined his job.

Two months later, on October 25, 1979, the Court held another conference with the parties. At that time the Court advised the pro se Plaintiff to obtain legal counsel to represent him (advice which the Plaintiff declined to follow). The Court also advised the parties that he would prepare a memorandum setting forth the exact issues to be tried. This Memorandum Opinion, filed on October 29, 1979, limited the issues at trial: "As the Court explained at the conference, the only valid issue under 43 U.S.C. §1983 as regards the Plaintiff's termination, is whether or not the plaintiff was discharged from employment in violation

of his First and Fourteenth Amendment rights." (The entire Opinion is set forth in Appendix "A" to this Brief.) The Petitioner never objected to this formulation of the issues by the Court.

After a three-day trial, the Court directed a verdict for three Respondents and the jury returned a verdict for the remaining Respondents. In the appeal to the Tenth Circuit Court of Appeals, Plaintiff argued, as he does to this Court, that he was not permitted to explore all relevant issues at trial.

The Pre-trial Order measures the dimensions of the lawsuit both in the Trial Court and on Appeal. American Home Assurance Co. v. Cessna Aircraft Co., 551 F.2d 804 (10th Cir. 1977). When issues are defined by the Pre-trial Order "they ought to be adhered to in the absence of some good and sufficient reason." Trujillo v. Uniroyal Corp., 608 F.2d 815, 817 (10th Cir., 1979). "If there is a properly drawn, detailed Pre-trial

Order, a Trial Court's determination that certain facts or issues must be excluded from trial on the basis of a Pre-trial Order may be reversed only if there is an abuse of discretion." Id, at 817-818.

In the present matter, the Trial Court specifically excluded any evidence on the issue of whether the State agency was acting in accordance with law. After two Court-conducted conferences, the Trial Court's October 29, 1979, Memorandum Opinion clearly stated, "[a]djudication of this claim does not require any determination of whether the State agency was acting in accordance with law." (See Appendix "A" at page i). The Tenth Circuit ruled that "[t]he only cognizable issue under §1983 was again restated by the District Judge at trial as whether Appellant was discharged for exercising a First Amendment right to make a protest or complaint against the State agency that employed him." (See Appendix 4 to Petitioner's Petition for Writ of Certiorari.) The Court of

Appeals went on to rule that the Trial Court had properly delineated the trial issues and properly excluded evidence concerning the lawfulness of the agency's directives. The Court found that the evidence was more than sufficient to support the jury's conclusion that the Petitioner was discharged for various non-acceptable work practices.

"The Pre-trial Conference is designed to restrict the scope of the trial by defining, and therefore, limiting the issues involved." Hodges v. United States, 597 F.2d 1014, 1017 (5th Cir. 1979). The Hodges Court explained the role of the Appellate Court in reviewing pre-trial procedural decisions:

> "We realize that for pre-trial procedures to continue as viable mechanisms of Court efficiency, Appellate Courts must exercise minimal interference with Trial Court discretion in matters such as the modification of it orders. . . .Thus we ascribe to the Trial Court a broad discretion to preserve the integrity and purpose of the pre-trial Order,. . . and in reviewing Trial Court decisions. . .we will not disturb the Trial Court's ruling unless it is

> demonstrated that the Trial Court has so clearly abused its discretion that its action could be deemed arbitrary." Id., at 1018.

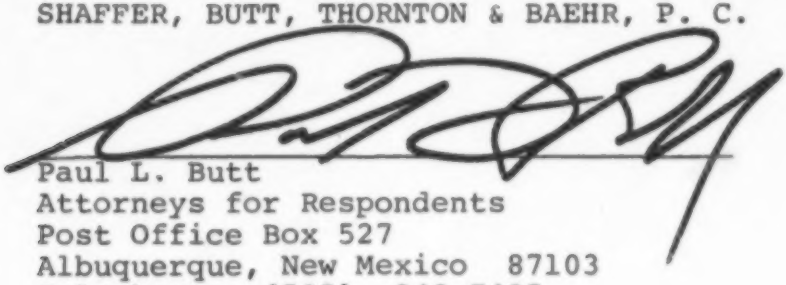
The Tenth Circuit Court of Appeals affirmed the Trial Court's pre-trial procedural decisions. This Appellate decision was neither in conflict with applicable Supreme Court decisions, nor representative of a deviation from acceptable judicial proceedings. This case does not warrant Supreme Court review.

CONCLUSION

Two lower Federal Courts have already ruled that Petitioner's §1983 claim was properly limited to the issues surrounding his termination, that is, whether Plaintiff was denied due process and whether he was discharged for engaging in protected First Amendment activity. This case presents no special or important reason for review. Contrary to Petitioner's claims, no conflicting decision has been rendered nor has

any deviation from acceptable judicial proceedings occurred. The present matter does not warrant review by this Supreme Court and Respondents respectfully request that the Petition for Writ of Certiorari be denied.

SHAFFER, BUTT, THORNTON & BAEHR, P. C.



Paul L. Butt
Attorneys for Respondents
Post Office Box 527
Albuquerque, New Mexico 87103
Telephone: [505] 843-7425

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOLUND WALTER SCHMEDT,

Plaintiff,

vs. No. CIV 78-959-B

FERNANDO E. C de BACA, et al.,

Defendants.

MEMORANDUM OPINION

This matter comes on for consideration upon the pending Motions in Limine filed by both the Plaintiff and Defendants, and the Motion of the Defendant, Kennis Berard, to dismiss, as well as all matters raised by the parties at the Pre-trial Conference held in this case on October 25, 1979.

This case involves a claim under 42 U.S.C., §1983, by the Plaintiff that he was wrongfully terminated from his job with the

State of New Mexico Department of Health and Social Services in December 1977. The Plaintiff claims that the State agency was not fully complying with State and Federal regulations in its administration of a work incentive program, and that he voiced his concern about this to his superiors. It is his contention that he was fired because he refused to violate what he felt was the controlling State and Federal law and policy. The Defendants claim that the Plaintiff was terminated for good cause, in that he failed to satisfactorily perform his assigned duties as an agency social worker. Throughout the discovery in this case, the Plaintiff, appearing pro se, has directed much attention to the workings of the State agency and the administration of the work incentive program. Likewise, in the consolidated Pre-trial Order in this case, the Plaintiff lists as witnesses 15 people, 13 of which he states will testify as to how they were treated by the State

Agency. The persistence of the Plaintiff in desiring to litigate the question of whether the State agency was or was not complying with Federal and State law has created serious disparities in how the parties view this case and in part prompted the Pre-trial Conference.

As the Court explained at the conference, the only valid issue under 42 U.S.C., §1983, as regards the Plaintiff's termination, is whether or not the Plaintiff was discharged from employment in violation of his First and Fourteenth Amendment rights. That is, to the extent that the Plaintiff is claiming that he was terminated because he spoke out on the policies and practices of the agency, then he has stated a claim under 42 U.S.C., §1983. Adjudication of this claim does not require any determination of whether the State agency was acting in accordance with law. The Court will not hear evidence on this issue as it is not material to the Plaintiff's claim of unlawful

termination of employment. Similarly, the Defendants must be limited to presenting evidence that the Plaintiff was not fired for exercising his First and Fourteenth Amendment rights, but rather was fired for a good and valid reason. In that connection, the Defendants would be entitled also to raise the affirmative defenses enumerated in their Answer, including sovereign immunity, failure to mitigate damages, good faith, lack of subject matter jurisdiction on the part of the Court, and failure of the Plaintiff to state a claim for punitive damages. These defenses were timely raised and properly pleaded and can be litigated at trial.

Having thus defined the issues in this case, the Court will consider the Motions in Limine filed by both the Plaintiff and the Defendants to be moot, and will deny them. While the Court recognizes the propriety and utility of Pre-trial Motions in Limine, it does not generally grant such

as they usually call for advisory opinions and force decisions on the evidence before the true context of the tender is established. In this case, the Court has sufficiently outlined the issues for the parties that any further evidentiary rulings at this point would not be useful. Therefore, the parties should prepare their case for trial, including their witnesses and exhibits in accordance with the guidelines given here.

Along these same lines, a question was raised at the Pre-trial Conference concerning whether Plaintiff's Requested Admissions and Statements of Fact should be taken as established. This request was previously ruled on by the United States Magistrate on June 29, 1979, and again on July 24, 1979. On both occasions, the Plaintiff's Motion to have these facts be taken as established was denied. The Court hereby adopts the findings and conclusions of the Magistrate

and will deny the Plaintiff's renewed request in this regard.

Turning then to the Motion of the Defendant, Kennis Berard, to dismiss, the Court finds that the Motion is not well taken and should be denied. The Defendant's Motion is based on Butz v. Economu, 438 U.S. 478 (1978), and claims that, as a hearing examiner, he is absolutely immune from any liability for any of his judicial actions. The Plaintiff has claimed that the Defendant was acting outside the scope of his judicial duties at the relevant time, and thus that he is not protected by the immunity outlined in Butz, supra. The Court can grant a Motion to dismiss only if the movant has shown that under no set of facts can the Plaintiff recover. The movant has not sustained that burden here, and the Motion should be denied.

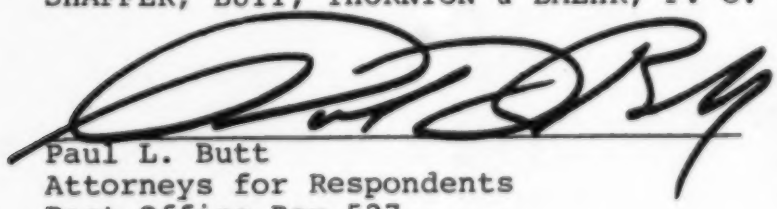
A separate Order will be entered in accordance with this Opinion.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, PAUL L. BUTT, a duly admitted Member of the Bar of the United States Supreme Court, do under oath state that on March 19, 1982, I directed that forty (40) copies of this Brief opposing the Petition for Writ of Certiorari be deposited in the United States Post Office with first-class postage prepaid and properly addressed to the Clerk of the Supreme Court and three (3) copies be similarly mailed to Petitioner, pro se, at 1331 Park Avenue, S. W., Unit 1110, Albuquerque, New Mexico 87102, and to my knowledge the mailing took place on the aforementioned date which was within the time permitted by the Court.

SHAFFER, BUTT, THORNTON & BAEHR, P. C.



Paul L. Butt
Attorneys for Respondents
Post Office Box 527
Albuquerque, New Mexico 87103
Telephone: [505] 843-7425

STATE OF NEW MEXICO)
) ss:
COUNTY OF BERNALILLO)

Subscribed and sworn to before me, a Notary Public, in and for the County of Bernalillo, State of New Mexico, this 19th day of March, 1982.

Martha E. Lopez
Notary Public

My commission expires:
April 7, 1985

OFFICIAL SEAL
MARTHA E. LOPEZ
NOTARY PUBLIC - NEW MEXICO
Notary Bond Filed with Secretary of State
My Commission Expires 4-7-85